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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS CO., *Petitioner*

v.

THE UNITED STATES, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Claims

BRIEF OF AMICUS CURIAE, THE AMERICAN CHEMICAL SOCIETY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The American Chemical Society submits this brief as *amicus curiae* in support of petitioner's petition for a writ of certiorari to the United States Court of Claims. Your amicus has obtained consents to the filing of this brief from both the petitioner and the respondent, which consents are attached hereto as Appendix A and made a part hereof.

INTEREST OF THE AMICUS CURIAE

The American Chemical Society is incorporated by the Federal Congress as a non-profit, membership, scientific, educational society composed of chemists and chemical engineers, and is exempt from the payment of federal income taxes under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended.

As of December 31, 1973, the American Chemical Society consisted of approximately 110,000 such above described members. Its Federal Charter was granted by an Act of Congress in Public Law No. 358, 75th Congress, Chapter 762, 1st Session, H.R. 7709, signed into law by President Franklin D. Roosevelt on August 25, 1937, to become effective from the first day of January, 1938.

Section 2 of the Act is as follows:

> "Sec. 2. That *the objects* of the incorporation *shall be to encourage in the broadest and most liberal manner the advancement of chemistry* in all its branches; *the promotion of research in chemical science and industry;* the improvement of the qualifications and usefulness of chemists through high standards of professional ethics, education, and attainments; *the increase and diffusion of chemical knowledge; and by its* meetings, professional contacts, *reports, papers,* discussions, and *publications, to promote scientific interests and inquiry,* thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people." (emphasis supplied)

Its Federal Incorporation replaced a New York State Charter, which had been effective since November 9, 1877.

One of the principal objects of the Society, as set forth in its Charter, is the dissemination of chemical knowledge through its publications program. The budget for the Society for the year 1974 exceeds $39,000,000, of which more than $22,000,000 is devoted to its publications program.

The Society's publications program now includes twenty periodicals varying from scholarly journals, containing reports of original research from such fields as medicinal chemistry, biochemistry, and agricultural and food chemistry, to a weekly newsmagazine designed to keep chemists and chemical engineers abreast of the latest developments affecting their science and profession. In addition, the Society is the publisher of CHEMICAL ABSTRACTS, the world's most comprehensive scientific abstracting and indexing service. The funds to support these publications are derived chiefly from subscriptions.

The journals and other published writings of the Society serve a most important function, namely: the increase and diffusion of chemical knowledge and related purposes of the Society. Revenues they generate permit the Society to support and continue its publications program in furtherance of its Congressional charter to serve the science and industry of chemistry. The protection of copyright has proved an important factor in the growth and development of the scientific-publishing program of the Society.

The Society's publications and their periodicity of publication, circulation, and the cost to subscribers, as of January 1, 1974, are as follows:

Publication	Periodicity of Publication	Circulation	Rates Members	Non-members
Chemical Abstracts	Weekly	Company & Individual 3,170 Universities 2,408		$2,900.00 $2,400.00
Constituents & Derivatives of Chemical Abstracts	No set schedule	In excess of 12,000		Range from $ 35.00 to 100.00
Journal of American Chemical Society	Bi-weekly	15,613	$22.00	$ 66.00
Chemical & Engineering News	Weekly	121,562	5.00	9.00
Analytical Chemistry	Monthly	30,898	5.00	7.00
The Journal of Physical Chemistry	Bi-weekly	5,262	20.00	60.00
Journal of Agricultural and Food Chemistry	Bi-Monthly	4,885	10.00	30.00
The Journal of Organic Chemistry	Bi-weekly	9,067	20.00	60.00
Journal of Chemical and Engineering Data	Quarterly	2,144	15.00	45.00
Journal of Chemical Documentation	Quarterly	1,946	7.00	21.00
Biochemistry	Bi-weekly	6,711	20.00	60.00
Inorganic Chemistry	Monthly	5,000	18.00	54.00
Journal of Medicinal Chemistry	Monthly	3,914	15.00	45.00
Chemical Reviews	Bi-monthly	5,581	13.00	39.00
Chemistry	Monthly	32,165	6.00	6.00
I&EC Process Design and Development	Quarterly	6,672	7.00	21.00
I&EC Fundamentals	Quarterly	6,702	7.00	21.00
I&EC Product Research and Development	Quarterly	6,763	7.00	21.00
Environmental Science and Technology	Monthly	26,108	6.00	9.00
Macromolecules	Bi-monthly	2,307	12.00	36.00
Chemical Technology	Monthly	13,537	9.00	18.00
Accounts of Chemical Research	Monthly	11,588	7.00	21.00

Additionally, the Society publishes on a non-periodical basis the following:

Directory of Members

Abstracts of Meeting Papers

Advances in Chemistry Series

Seidell's Solubilities of Inorganic and Organic Compounds

Specifications and Test Methods for Laboratory Reagent Chemicals

Collective Indexes to Chemical Abstracts and Society Journals

Such other books, pamphlets, and reprints as may be authorized by the Board of Directors.

The twenty primary periodical publications of the Society produce more than 43,000 pages a year, and CHEMICAL ABSTRACTS produces more than 127,000 pages a year. Its abstracts number in excess of 380,000 annually and its documents indexed in excess of 410,000.

From the foregoing, it is obvious that the amicus has a deep and abiding interest in the outcome of this case. It should also be obvious why the amicus supports the position of the petitioner in the case; it is abundantly clear that, in working toward the objective of the advancement of the science and technology of chemistry, the most effective possible dissemination of information is a primary requirement. In order to effect this, the American Chemical Society, operating as a non-profit society, works to build the best possible record of scientific knowledge related to chemistry and to find ways to get that knowledge as effectively as pos-

sible into the hands of those who need and use it. On the one hand, there is the problem of cost per user, which the Society endeavors to maintain at a level which will not be a serious barrier. On the other hand, the expenses of doing this are very considerable and they must be met in full or else the system will begin to degenerate. If copying and distribution which bring no return at all to the American Chemical Society are permitted, and if this material is made available so that users need not subscribe to the publications, the result will be a reduction of paid circulation and a smaller base over which to distribute the costs, thus driving up the unit costs, ultimately to unacceptable levels. Such appreciable increases in cost would defeat efforts to maintain the objective of broad and effective dissemination.

This amicus believes that the actions of which the petitioner complains have a deleterious effect on its objects as set forth above.

ARGUMENT

The American Chemical Society supports the position of the petitioner as set forth in its petition and adopts the authorities cited therein. Rule 19 of the Supreme Court Rules indicates that a review of a writ of certiorari will be granted only where there are "special and important reasons." By way of example of the character of reasons which will be considered, Rule 19 sets forth the situation where the Court of Appeals (or the Court of Claims) "has decided an important question of federal law which has not been, but should be, settled by this Court." The questions presented by the present case fall squarely within the purview of Rule 19 of the Supreme Court Rules.

To illustrate, one need go no further than the opening statement by Judge Davis in the majority opinion in the Court of Claims:

> "We confront a ground-breaking copyright infringement action under 28 U.S.C. § 1498 (b), the statute consenting to infringement suits against the United States."

Certainly, the Judge's statement was well taken and quoting again from his opening paragraph, we cite these words:

> "Those issues have never before been mooted or determined by a court."

It is unfortunate that the majority, having started off so well, placed itself in the position of usurping the legislative authority of the Federal Congress by totally ignoring the clear meaning of the copyright law as set forth in 17 U.S.C. § 1(a):

> "§ 1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right;
>
> (a) To print, reprint, publish, copy, and vend the copyrighted work;"

and 17 U.S.C. § 3 providing, in pertinent part:

> "§ 3. PROTECTION OF COMPONENT PARTS OF WORK COPYRIGHTED; COMPOSITE WORKS OR PERIODICALS. The copyright provided by this title shall protect all the copyrightable components of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall

> give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title."

Flying in the face of this language, the Court of Claims' majority injected itself as an extraordinary legislature, and in so doing clearly reflected some of the same lobbying pressures which are very properly a part of our constitutionally ordained legislative process. They accepted the view of what some told them the law ought to be, not what it is. They reached an unjustified conclusion, which if it were not so serious would be ludicrous for a superior court of this standing, when they made the statement in the majority opinion:

> "Hopefully, the result in the present case will be but a 'holding operation' in the interim period before Congress enacts its preferred solution."

Having reached that conclusion, we now go back to the point where the Court sets out in its majority opinion eight criteria which lead it to its legislative decision, rather than to an appropriate judicial determination, and as criterion number eight, it cites the practices of foreign countries, whose laws are different from and often contrary to ours, as a reason why it should enact this "holding operation" while waiting for the Congress to act. Such fundamental lack of reasoning represents a wanton disregard for accepted judicial principles in statutory interpretation. This very court as recently as January 22, 1971 in the case of *Schmid* v. *The United States*, 436 F.2d 987 (Ct. Cl. 1971), *cert. denied*, 404 U.S. 951, used this language:

> "We find that the section is clear and unambiguous on its face and is susceptible, on its face, of only one interpretation. The relevant part of the last sentence of section 687(a) provides that

> 'For the purposes of this subsection * * *(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded * * *.' Congress imposed no express or implied limitation on the applicability of this rounding provision. The clear indication is that, in determining eligibility for readjustment pay and in computing the amount thereof, a period of 6 months or more is counted as a whole year.
>
> But, although we find no ambiguity in the words of the statute, we are not precluded from examining the legislative history underlying the enactment in order to determine whether there is clear and compelling support for the interpretation urged by the defendant. ***See Lionberger*** v. *United States*, 178 Ct.Cl. 151, 157, 371 F.2d 831, 834, *cert. denied*, 389 U.S. 844 (1967). As the Supreme Court has said, '[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'' *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940) (footnotes omitted). After a careful review of the legislative history of section 687(a), we conclude that the support which it lends to defendant's position is not so clear and compelling as to require us to adopt an interpretation of the section inconsistent with the clear import of its terms.''

Stated another way, where the meaning of a statute is clear a court should not question the appropriateness of the statute's provisions and should not substitute the court's language for that expressed in the statute. *Helvering* v. *Hammel*, 311 U.S. 504 (1941); *Caminetti* v. *United States*, 242 U.S. 470 (1917); *Arkansas Valley Industries* v. *Freeman*, 415 F.2d 713 (8th Cir. 1969).

Here the Court of Claims has set aside past judicial interpretations of the copyright law as relating to the doctrine of "fair use." It has set aside the clear meaning of the copyright statute as it relates to copying and has placed itself in a position of acting as an interim legislative body in hopes that the Federal Congress will act on this subject in a fashion which would support the conclusions of the majority in its conjecture regarding future legislative intent. It should be noted here that the Federal Congress has been wrestling with an omnibus copyright revision for the past seventeen years. It is now entering its eighteenth year of such consideration, and no break in the logjam is yet apparent. For the courts of our country so to invest themselves with authority in this field and in this fashion is to lay ourselves open to an insidious and unprecedented invasion of the legislative province by judicial conjecture. We believe there are several other considerations which will impel this Court to entertain this writ of certiorari so that it may have the opportunity to rule on this case which we believe requires reversal and remand with directions to adopt the trial judges' opinion as the finding of the Court. We cannot in saying this pass by the dissenting opinion of Chief Judge Cowen, who most eruditely has disposed of this case in its proper context. Likewise, Judge Nichols in his additional dissent points out the absolutely twisted doctrine adopted by the majority, and we quote from page 69 where Nichols says:

> "However hedged, the decision will be read, that a copyright holder has no rights a library is bound to respect. We are making the Dred Scott decision of copyright law."

This Court need not be reminded of the social and political problems brought upon our country by the mentioned decision.

Review of the Court of Claims' decision is necessary to resolve what appears to be a paradox which has developed regarding whether the "progress of science" set forth in Article I, Section Eight of the United States Constitution will be served better by a decision for the petitioner or the respondent. On page 14 of the majority opinion in the Court of Claims, the Court sets forth three propositions upon which it bases its decision. The first is that the petitioner is not being "substantially harmed." The second is that medicine and medical research will be injured by holding the particular practices to be an infringement; and the third states that until the legislature solves the problem, the Court does not wish to place a risk of harm upon science and medicine. Therefore, two of the three propositions leading to the decision are founded upon the Court's disposition toward protecting and promoting the progress of science and medicine. Your amicus contends that the Court of Claims' decision, if allowed to stand, will have just the opposite effect and will, in fact, retard progress of the sciences. The Court of Claims' minority decisions fully and adequately overcome the fears of the majority that progress in science will be retarded if the complained of use is determined unfair, by showing that what is sought is compensation as required under the statute rather than prohibition of use. Your amicus goes one step farther and states that failure to compensate the copyright owner will ultimately lead to the retardation of progress in science.

Unlike the petitioner herein, your amicus is a non-profit organization whose purposes, as previously set forth, include "the increase and diffusion of chemical knowledge by . . . reports, papers, discussions, and publications." Congress has seen fit to encourage such purposes and in furtherance thereof, has extended to the American Chemical Society and like scientific organizations exemption from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954. It was with this same keen interest in the advancement of the sciences and learning that Congress enacted the copyright laws. Protection of an individual's copyright was recognized as essential even prior to the assembling of the Constitutional Convention. At that time, twelve of the thirteen colonies, all but Delaware, already had laws to protect the copyright interests of individuals. The copyright law itself recognizes that protection for an individual's endeavors is the *quid pro quo* for progress in learning and the sciences, and without such encouragement, the growth of our scientific knowledge will be stunted. *Omnibus Copyright Revision, Comparative Analysis of the Issues,* Cambridge Research Institute, American Society for Information Science, August 1973. In *Washington Pub. Co.* v. *Pearson,* 306 U.S. 30, 36 (1954), the Court recognized that these copyrights were "to afford greater encouragement to the production of literary works of lasting benefit to the world" and in *Mazer* v. *Stein,* 347 U.S. 218, 220 (1939), the Court stated:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of the

> individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'science and useful arts'."

The goals of the American Chemical Society, like the goals of the copyright law, are to encourage progress in science, and the scientific works of the Society and other like organizations will be adversely affected by the decision of the Court of Claims. A review of the previously listed circulation figures of each of the Society's publications shows that only one of the twenty periodicals enjoys a circulation in excess of 32,000. Fourteen of the twenty publications have a circulation of less than 10,000, and eight have a circulation of less than 6,000. Even a few hundred subscribers lost because of the massive infringing practices of the libraries can affect the unit subscription price of the periodical. This problem can best be seen in the case of the Society's CHEMICAL ABSTRACTS service. There are a total of only 5,578 subscribers to this service. The price is $2,900 per year to companies and individuals and $2,400 per year to universities. It takes little mathematical talent to recognize that photocopying of large portions of these periodicals can be accomplished at a fraction of the cost of a subscription.

The request of the American Chemical Society is not to restrict the dissemination of scientific information, for such dissemination is precisely the purpose of the Society. Its complaint is not the loss of profits to the Society, for the Society makes no profits. The appeal of the Society is to allow it to continue to publish its scientific periodicals and be compensated for their dissemination as required by

Congress, so that the proceeds therefrom may be reinvested in further dissemination of scientific knowledge.

Your amicus believes that no better case for review can come before this Court. We do not have here minor sporadic photostatic copying of portions of scientific articles, but rather the wholesale electronic copying of millions of pages per year including primarily the copying of entire articles for free distribution to whoever might ask for them. In no case have the lines been so clearly drawn, and your amicus believes that this is the case for which lawyers, academicians, librarians, and government officials alike have been waiting so that this Court might make some definitive pronouncement concerning a practice which has been and is still without proper judicial guidance since the invention of photocopying equipment.

The electronic revolution is advancing at such a pace that this Court must make a pronouncement on the effect of this new equipment on the existing law before practices are established that would have even more deleterious effects when applied to more advanced electronic equipment as yet not invented. The infringing practices of today will be of even greater consequence to the non-profit scientific societies when mass dissemination of information becomes even easier by the advancement of the electronic processes. It has already been forecast that the printed journal may someday be obsolete to be replaced by instant around-the-world dissemination of information through video display tubes. The law as interpreted today by this Court will have far-reaching implications on these technological advances.

The American Chemical Society disseminates more scientific information in the field of chemistry than any other organization. Its accomplishments in this area have been recognized both by Congress and by other branches of government. Its investments are great from the standpoint of both manpower and dollars. Your amicus believes that this program is a vital service which must be continued. The Society is deeply concerned, however, that the unauthorized use of materials under an increasingly liberal "fair use" doctrine could impair, or even destroy, its ability to generate, publish, and disseminate such scientific information in the future. While the Society in no way seeks to hamper or restrict either the learning process or the use of technological developments and equipment needed to improve the exchange of information, (but rather tries to promote them) it cannot be oblivious to the effects of these developments on the essential financial support needed to continue the publishing function which generates the basic materials.

It is conceded that it would be difficult or impossible to obtain accurate figures to indicate precisely the volume of current uncontrolled copying in terms of subscription losses. It can be shown, however, that this problem is particularly acute in the area of chemical publications. In a study of the copying of technical journals from the New York Public Library, five American Chemical Society journals appeared on the list of twenty-two most copied journals, and ranked two, three, five, twelve, and thirteen respectively. Bonn, George S., "Science Technology Periodicals," Library Journal, 88(5), 954-8, March 1, 1963.

CONCLUSION

The purposes of the American Chemical Society, like the purposes of the copyright law, are to promote progress in science. The eroding of the protection afforded under the copyright law will result in the retarding of the Society's efforts toward progress in science. The erosion caused by the Court of Claims' decision concerning "fair use" will be so swift that the Society cannot afford to accept that decision as a "holding position" until some undetermined date when the Congress takes appropriate action. The present case has all the ingredients necessary for the Court to take an affirmative position on this copyright question which has been essentially without judicial guidance since the invention of photocopying equipment.

Accordingly, the Society reiterates its support of the petitioner and respectfully urges that this Honorable Court grant the petitioner's petition for a writ of certiorari to the United States Court of Claims.

Respectfully submitted,

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APPENDIX A

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530

January 29, 1974

William J. Butler, Jr., Esq.
Hanson, O'Brien, Birney, Stickle
and Butler
888 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: *The Williams & Wilkins Company* v. *United States*

Dear Mr. Butler:

As requested in your letter of January 28, 1974, I consent to the filing by the American Chemical Society of a brief *amicus curiae* in support of the petition for a writ of certiorari to be filed in the above case.

Sincerely,

/s/ ROBERT H. BORK
Robert H. Bork
Solicitor General

LAW OFFICES
COWAN, LIEBOWITZ & LATMAN, P.C.
200 EAST 42ND STREET
NEW YORK, N.Y. 10017

January 30, 1974

William J. Butler, Jr., Esq.
Hanson, O'Brien, Birney,
Stickle and Butler
888 Seventeenth Street, N.W.
Washington, D.C. 20006

Re: *Williams & Wilkins* v. *The United States*
U. S. Supreme Court: October Term 1973

Dear Mr. Butler:

In response to your request of January 28, the Williams & Wilkins Company hereby consents to the filing of a brief *amicus curiae* by the American Chemical Society on the petition for a writ of certiorari in the above matter.

Sincerely yours,

/s/ ALAN LATMAN
Alan Latman

AL:DM